carried on the business of a mercer with his wife, part of the time in *St. Ann's Square.* By his will, after certain devises, &c., the real estate was devised in remainder to the right heirs of the testator. A bill was filed by one of the co-heiresses-at-law of Wareing, asking for a general administration of his estate, and also that the good-will of the business in St. Anne's Square should be sold and the proceeds secured for the beneficiaries under the will. It appeared that Eleanor Wareing, before she married the testator, had carried on the business of a milliner and dressmaking, and continued to do this after her marriage, independently of her husband, who merely kept the books. At the time of "Wareing's death the business of dressmaking had been carried on for some years on the premises in *St. Ann's Square,* under the name of Ellen Wareing. The success of the business was independent of location. Mrs. *Wareing* continued the business after her husband's death, and finally sold the good-will for a considerable sum. Held, by Lord ROMILLY, M. R., that the good-will of the dressmaking business belonged to the widow, as she could not have been prevented after the death of her husband from carrying on the business. It is to be noticed that in this case Mrs. Wareing retired from the business on selling the good-will, and that it would probably have had but little if any value if she had continued to pursue the business. A. S. BIDDLE.

RECENT AMERICAN DECISIONS.

Supreme Court of Rhode Island.

MANN v. ORIENTAL MILL CO.

The rule whereby a servant is precluded from indemnity against injury caused by the negligence of a fellow-servant, only extends to the ordinary employment of the servant. If the servant is ordered by a superior servant to do a dangerous act out of his ordinary course, whereby he suffers damage, the master will be responsible.

CASE for damages resulting from an accident to plaintiff while in the employment of defendant.

Plaintiff was employed as a fireman to tend the fire in an engine in the defendants' mill. At the trial evidence was offered tending to show that when employed he was given to understand he was to obey the orders of the engineer. The engineer called on him to assist in throwing on a belt, which was used to operate the

pump which filled the boiler, and in doing this he suffered the injury complained of.

He had several times before been called on to do the same thing, but there was evidence that at this time there was a peculiar danger, from the condition of the belt and the speed of the machinery.

The opinion of the court was delivered by

POTTER, J.—The defendants claimed that they were not liable: 1st. Because the engineer and plaintiff were fellow-servants, and there was no evidence that the engineer was an incompetent person.

2. That there was a belt-fixer, or person especially employed to fix the belts in the mill, and that it was not the business of the engineer or within his department.

The first objection is that the judge charged that if the engineer was the plaintiff's superior, and had a right to give orders in his department which the plaintiff was instructed to obey, the case would not come within the principle regulating liability of employer in case of negligence of a fellow-servant; and the superior must in this regard be looked upon as representing the employer, and if the employer would have been liable if the orders had been given directly by him, he would be liable if they were thus indirectly given through the engineer.

It is objected, secondly, that, by way of illustration, the judge referred to the case of a farmer setting a servant to clean a well: if the well was in ordinary order, the laborer could judge of the danger as well as the employer, but if the well was so defectively built as to be peculiarly dangerous, and the employer gave no warning of it, he might be liable in case of accident.

And the judge further said that if this fireman was suddenly called on to perform a dangerous service, not strictly within the line of his duty and requiring peculiar skill, there would be no presumption that he knew the risks of it: and if so, he should not have been directed to do it without information of the nature of the service and risk.

Thirdly: It is objected that the judge refused to charge the jury that there was no cause of action set forth in the plaintiff's declaration.

And fourthly: The defendants' counsel requested the judge to

charge that if there was a regular belt-fixer, and the plaintiff knew it, and he was employed merely as a fireman, then if the engineer gave him an order to shift the belt, it would be out of the line of his duty, and the defendants would not be liable.

But the judge charged that if he was instructed not to obey the engineer out of the line of his employment, and he chose to do so, he could not hold the defendants liable; but that there was no evidence that he was so instructed, but so far as the evidence went it was the other way, and that in the absence of such instructions the engineer would be authorized to call upon any one under him in another capacity to assist (the engineer) in any matter within his (the engineer's) department: and if he did, the defendants would be liable, even if there was another person who might more properly be called upon; but that if the throwing on and off of the belts was not within the engineer's department but was confined by the corporation to a belt-fixer, the defendants would not be liable.

We have been referred to decided cases, showing the general rule that the master is not responsible to a servant for injuries resulting from the negligence of a fellow-servant employed in the same general business. And the rule is the same if the servants are engaged in different departments.

So also if the negligent servant was in a superior station, provided the fact of such superiority is not an element in causing the injury, i. e., if the injury might as well have happened if he had not been superior.

So also if the person injured was subject to and at the time obeying the orders of the superior negligent servant, the master would not necessarily be liable if the injured person was at the time acting under the superior in a branch of business for which he was specially employed and the risks and dangers of which he may be presumed to be acquainted with. In such a case his knowledge of the danger would be considered in estimating the degree of care he should use to avoid it.

These rules however are subject to certain well understood exceptions growing out of the duty of the master to select proper servants and provide proper machinery.

In the present case the jury were told substantially and we think rightly, that if the fireman although employed only for a fireman, was placed under the orders of the engineer and was by

him suddenly called upon to assist in throwing on a belt, out of his own sphere, but within the sphere of duty of the engineer, and was thus subjected to a risk with which he was not acquainted, or to a peculiar and greater risk at that time, and of which he was not informed or cautioned, then the defendants would be liable.

And we think the jury were rightly told that if the fireman was placed under the engineer as his superior, and this superior had a right to give orders in his department, the case did not come within the principle regulating liability in cases of fellow-servants, and that the engineer must be looked upon as representing the employer.

If the person here injured had been an inferior servant and had been injured by the negligence of a superior servant in the same department, e. g., if he had been placed under a superior fireman by whose neglect he had been injured, the case would have been different. And it might then be argued that he must have known and calculated the risks of such employment.

In the present case the fireman was not injured while working in his own particular department, but was injured by the neglect of a superior whose department was more extensive, including his (the fire) as a part of it. The engineer not only had a delegated authority or control, but it was the exercise of this delegated authority which was the cause of the injury.

And there were several points in the present case, such as the being suddenly called upon, and the want of opportunity to examine and estimate the danger, which have in the reported cases been allowed considerable weight in deciding upon the question of liability.

The third exception was not relied upon in argument, and as to the fourth we think the charge correct.

We think therefore the exceptions cannot be sustained and the motion for new trial is denied.

The foregoing opinion, upon a most embarrassing question, will not fail to commend itself to all lovers of justice. But from that large class of the profession who, from habit or education, look first for symmetry, and then for justice, it may possibly encounter some distrust, but is nevertheless sound, we believe. There is, in our judgment, no topic of the common law more beset with doubt and perplexity than this one, of the exact responsibility of the master for injuries to his servant, through some act of a fellow-servant, or some defect of machinery unknown to the master. If the fellow-servant, through

whose act the damage accrues is incompetent, to the knowledge of the master, and not understood to be so by the other servants, or if he was employed without proper precaution, and proved incompetent, whereby a fellow-servant suffers damage, or if the servant is injured, in consequence of acting under the direction of a servant of superior grade, and in some department out of the general employment of the servant thus injured, the cases seem to agree the master is responsible. *Railway* v. *Jackson*, 55 Ill. 492, where a freight brakeman was thrown from the train and killed, in attempting to descend a ladder, which proved defective, in obedience to the order of his superior, in order to change a switch, a matter not within the range of his ordinary employment. But if the loss of life had accrued, in consequence of the train running off the track, by reason of the displacement of the switch, it would have been a case within the ordinary range of the duty of a fellow-servant, and there could have been no recovery against the master: *Tinney* v. *Railway*, 62 Barb. 218. And *Huddleston* v. *L. M. Ship*, 106 Mass. 282, is a case of the same class with *Railway* v. *Jackson*, *supra*. There are other cases of the same character: *Frost* v. *Union Pacific Railway*, 11 Am. Law Reg. N. S. 101; *Chicago Railway* v. *Hamey*, 28 Ind. 23. So also if one is injured through defects in the engine he is put to drive, of which he had no knowledge, the master will be held responsible: *Evans* v. *Fitchburg Railway*, 111 Mass. 142; *Columbus & C. Railway* v. *Arnold*, 31 Ind. 174.

So that the present rule seems to be, that the servant is only excluded from obtaining compensation of the master, for such damage accruing through the neglect of fellow-servants, or defects of machinery, as arose in the regular cause of his employment, and where there was nothing to mislead him as to the true nature of the perils by which he was surrounded. As to these ordinary and constant perils, by which all servants will be beset, in all employments, and which it is impossible effectually to guard against, by any reasonable and ordinary degree of vigilance on the part of the master, it is deemed more reasonable, and a better policy, that the servant should run his own risk. Such position will afford motive for greater diligence and watchfulness on the part of the servant, and will, at the same time, prompt him to exercise proper watchfulness over his fellow-servants, to secure both competency and faithfulness on their part. These seem to be the only grounds upon which any such exceptional rule, as the one we are considering, can be justified, and there seems no good reason to extend such an exceptional rule beyond the requirements of the principle of policy upon which it is founded. Most of the cases will be found in the chapter which we have devoted to the subject, in our Railways, vol. 1, pp. 543, *et seq.*, § 131. There are some very extreme cases to which we need not refer. In *Railway* v. *Harrison*, 48 Miss. 112, the conductor compelled a mere stranger boy, standing by, to uncouple the cars, whereby he suffered damage, and the recovery against the master was denied. And the mere fact that the servant acts under the orders of his superior will not, commonly, render the master responsible: *Faltham* v. *England*, L. R. 2 Q. B. 33. See also *Railway* v. *Drowney*, 17 Ohio N. S. 147.

I. F. R.